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No. 92-94

IN THE
Supreme Court of the United States
October Term, 1992

LARRY ZOBREST, ET AL.,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT
ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE ALEXANDER GRAHAM BELL
ASSOCIATION FOR THE DEAF,
AS AMICUS CURIAE IN SUPPORT
OF PETITIONERS**

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Interest of the Amicus Curiae

The Alexander Graham Bell Association for the Deaf (AGBAD) is an organization comprised of persons who are hearing-impaired and of parents, professionals and other persons having an interest in the welfare of hearing-impaired individuals. The mission of AGBAD is to empower persons who are hearing-impaired to function independently by promoting universal rights and optimal opportunities for such persons, from infancy through adulthood, to learn to use, maintain, and improve all aspects of their verbal communication, including their abilities to speak, speechread, use residual hearing and process both spoken and written language.

AGBAD strongly supports the purposes and precepts of the Individuals With Disabilities Education Act (formerly known as the Education for All Handicapped Children Act or the EHA), which was enacted to ensure that

all disabled children are provided with a free appropriate education in the least restrictive environment possible. The least restrictive environment concept is particularly important to the members of AGBAD, whose primary goal is to ensure that deaf children become fully participating members of mainstream society.

AGBAD's interest in this case is to ensure that deaf children are not denied the right to receive an appropriate education for lack of technological assistance and services necessary to allow them to understand and process the spoken word.

Issue Presented

Does a state's provision of an interpreter (analogous to a typist who types the spoken word for the benefit of a reader) to enable a profoundly deaf student in a parochial school to obtain the free appropriate education required by the Individuals With Disabilities Education Act violate the Establishment Clause of the First Amendment?

Summary of Argument

This *amicus* brief has three purposes: *First*, to explain briefly the nature and responsibility of an interpreter for a deaf individual and the manner in which that interpreter operates. *Second*, to acquaint the Court with some of the severe practical consequences of affirming the majority's opinion below. *Third*, to explain the purely secular purpose that many deaf children have in obtaining the vital individualized attention typically offered them in private schools (both parochial and non-parochial).

Argument

I. The Nature and Function of an Interpreter

Deaf people utilize a variety of assistive devices and services to enable them to understand the spoken word. Some deaf people have enough residual hearing that they are able to benefit from hearing aids and/or assistive listening devices, such as FM systems, induction loops and infrared systems (which allow some hearing-impaired people to understand the spoken word in settings such as courtrooms, conference and meeting rooms, auditoriums and classrooms).

Those deaf people who do not have sufficient residual hearing to benefit from auditory devices must rely on visual means of communication. One means of visual communication is real-time captioning. A specially trained typist, similar to a court reporter, types everything that is said verbally, and the typed word is produced on either a computer-size or movie-size screen. Deaf people who do not know sign language (and thus cannot utilize a sign language interpreter) and are not sufficiently expert speechreaders to enable them to benefit from an oral interpreter¹ sometimes utilize this means of communication when trained personnel and equipment are available.

A second means of visual communication is the use of sign language or oral interpreters. For some deaf people, the use of interpreters is the most practical and efficient (and frequently cost-effective) means of understanding

¹ An oral interpreter mouths the words of a non-speechreadable speaker without using any voice. The deaf person reads the mouth movements of the interpreter rather than of the speaker (who may be too far away to speech-read, out of the deaf person's line of vision, moving around, have a moustache, accent or overbite that prevents speechreading, or simply not move his or her mouth enough to make speechreading feasible).

the spoken word, particularly in a classroom setting, where it is necessary to eliminate any "lag time" so that the deaf person may himself participate in classroom discussion.² An interpreter, like a real-time captioner, is a human being who performs the simple, mechanical function of conveying the spoken word to a deaf person. The interpreter simply repeats what the speaker is saying in a form that is possible for the particular deaf person to understand.

As Judge Tang noted in his dissenting opinion in this case, the majority of the Ninth Circuit correctly refrains from holding "that the First Amendment would be offended by the state's provision of a hearing aid or eyeglasses to a parochial school student."³ Nor would the majority of the Ninth Circuit hold that a state's provision of real-time captioning *equipment* for a parochial school student would violate the First Amendment. For the same reason, a state's provision of a *typist* to type the information into real-time captioning equipment could not properly be regarded as violative of the First Amendment. To hold otherwise, simply because the *equipment* is non-human and the *typist* is human, would make no sense in terms of the underlying purpose of the requirement of separation of church and state.

An interpreter provides an identical function to that provided by a typist who types the spoken word into real-

² The term "lag time" is used to denote the time that elapses between the moment a word is spoken and the moment that word is conveyed to a deaf listener via real-time captioning or an interpreter. The lag time is much greater when real-time captioning is utilized because it takes much longer to type what is being stated than to sign or mouth what is being stated. Thus, for example, a deaf professor will utilize an interpreter in the classroom to interpret student comments and questions; because the lag time is minimal the professor is able to respond immediately to the student.

³ 963 F.2d at 1201 (Tang, J., dissenting).

time captioning equipment. Both the typist and the interpreter are responsible for conveying the spoken word to a deaf recipient in a mode of communication that the deaf person can best understand. Just as a state's provision of a real-time captioner (typist) for a deaf parochial school student should not be held to violate the First Amendment, a state's provision of an interpreter for such a student should not be held to violate the First Amendment.

II. The Severe Practical Consequences of the Majority's Decision Below

Mainstreaming⁴ is the ultimate goal sought by many parents and educators of disabled children (and by many older disabled children themselves). Mainstreaming is viewed by such parents, educators and students as a crucial means of preparing a disabled child to be a fully functioning, participating member of the larger non-disabled society. Indeed, mainstreaming underlies the basic precept of the Individuals With Disabilities Education Act,⁵ which requires that every disabled child be provided with a free appropriate education⁶ in the least restrictive environment possible.⁷

⁴ The term "mainstreaming" is used in this brief to denote the practice of placing a disabled child in a "regular" classroom with non-disabled students, rather than in a special classroom or program for disabled students.

⁵ 20 U.S.C.A. §§ 1400-1485 (West Supp. 1991). Prior to 1991 amendments, the Individuals With Disabilities Education Act was entitled the Education for All Handicapped Children Act, and was commonly called the EHA or the EAHCA. The opinions below refer to the earlier title.

⁶ See 20 U.S.C.A. § 1401(a)(18) (West Supp. 1991).

⁷ See 34 C.F.R. § 300.550 (1988). For a discussion of the least restrictive environment concept and how mainstreaming fits within that concept, see Tucker, B. and Goldstein, B., *Legal Rights of Persons With Disabilities: An Analysis of Federal Law* (LRP Pub. 1990), pp.12:11-12:12.

Mainstreaming, however, poses special difficulties for deaf children. Because of their severe communication difficulties, deaf children have serious academic difficulties.⁸ Deaf children also encounter serious social problems in mainstream settings, again the result of their substantial communication difficulties.⁹ Both the academic and social difficulties of deaf school children are greatly alleviated by placement in small, structured classroom settings and participation in programs that provide individual attention from teachers and other support personnel. Frequently, however, these educational advantages are not available in public schools, particularly at

⁸ See, generally, Commission on Education of the Deaf, *Toward Equality: Education of the Deaf*, U.S. Government Printing Service, Washington, D.C., February 1988; Adkins, Dale V., Ed., "Families and Their Hearing Impaired Children," *The Volta Review*, Vol. 89, No. 5, Alexander Graham Bell Association for the Deaf, September 1987 (hereafter "Families and Their Hearing Impaired Children"); Chorost, S., "The Hearing Impaired Child in the Mainstream: A Survey of the Attitudes of Regular Classroom Teachers," *The Volta Review*, Vol. 90, No. 1, Alexander Graham Bell Association for the Deaf, January 1988; Cohen, O.P. and Long, G., "Selected Issues in Adolescence and Deafness," *The Volta Review*, Vol. 93, No. 5, Alexander Graham Bell Association for the Deaf, September 1991 (hereafter "Selected Issues in Adolescence and Deafness"); Froehlinger, V.J., Ed., *Today's Hearing Impaired Child: Into The Mainstream of Education*, Washington, D.C., Alexander Graham Bell Association for the Deaf, 1981; Saur, R., Popp-Stone, M.J. and Hurly-Lawrence, E., "The Classroom Participation of Mainstreamed Hearing-Impaired College Students," *The Volta Review*, Vol. 89, No. 6, Alexander Graham Bell Association for the Deaf, October/November 1987; Vodehnal, S.K., *They Do Belong: Mainstreaming the Hearing Impaired*, Denver, Colorado, The Listen Foundation, 1981; Webster, A. and Elwood, J., *The Hearing Impaired Child in the Ordinary School*, Dover, New Hampshire, Croom Helm, 1985.

⁹ See, generally, Higgins, Paul C., *The Challenge of Educating Together Deaf and Hearing Youth, Making Mainstreaming Work*, C.C. Thomas, Pub., 1990, pp. 1-13, 108-09; Selected Issues in Adolescence and Deafness, *supra* note 8; Oberkotter, M.L., Ed., *The Possible Dream: Mainstream Experiences of Hearing-Impaired Students*, Washington, D.C., Alexander Graham Bell Association for the Deaf, 1990.

the junior high school and high school levels. As one commentator has noted:

On the junior and senior high school levels . . . schools are organized differently [than elementary schools]. Many secondary schools are quite large, due in part to school districts regionalizing on this level. Administrators and staff have many more students to think about than a single child with a hearing loss. Large class size introduces a feeling of anonymity among the students, making it more difficult for teachers to get to know students individually. The schools have rotating classes; teachers customarily deal with six or seven large groups of students during the course of a day, each group for a limited period of time. This can result in the teachers having a fragmented view of their students. Further, these teachers believe their job is beyond that of teaching basic skills; many use a narrow range of methods in teaching their particular subject specialty. Their basic approach is group rather than individual instruction. Independent learning is a priority, with greater competition among students. These conditions make secondary level mainstreaming [of deaf children] more challenging.¹⁰

Because of the grave difficulties experienced by deaf children in mainstream settings where the environment is not structured appropriately to meet the unique needs of students who are unable to hear, parents of deaf children frequently place such children in smaller private schools where they are able to receive greater individual attention, and where there is a greater likelihood that they will

¹⁰ Families and Their Hearing Impaired Children, *supra* note 8, p.124.

adapt socially. In a smaller, more structured setting, teachers are able to assist deaf children in making friends and participating in school activities; deaf children are not subject to as much teasing and abuse from unsupervised students; and deaf children are less likely to be unduly influenced by harmful peer pressure due to feelings of profound isolation and the consequential frantic need to belong "somewhere."

To assist parents in meeting the expense of such private placement, AGBAD offers numerous scholarships each year to deaf children who attend private schools. During the years 1990, 91 and 92, for example, AGBAD granted 161 such scholarships to deaf children throughout the United States. Of those 161 scholarships, 119 were awarded to children in parochial schools. Parochial schools are frequently selected as the educational institutions of choice by parents requesting AGBAD scholarships for their deaf children for two reasons: one, because in some cases a parochial school is the only private school available in the community in which the family resides; two, because the tuition at a non-parochial private school in that community is often so high that it is beyond the family's financial means, even with the assistance of an AGBAD scholarship.¹¹ Parents consistently state the strong need to send their deaf children to private schools for the reasons cited above. To most of those parents,

¹¹ See, e.g., Alexander Graham Bell Association for the Deaf, 1992 *Financial Aid Award Applications*, Question C, p. 4, Washington, D.C., 1992. The question asked is: "State reasons for selecting this educational setting." The reasons cited in this brief for parental decisions to send their deaf children to private schools, both parochial and non-parochial, are the reasons most commonly stated in response to this question.

whether the private school is a parochial school or a non-parochial school is irrelevant.¹²

If deaf children are to benefit from the structured educational environment that many of them require, it is imperative that they be provided with necessary technological and support services to allow them to understand and process the spoken word. In many cases those technological and support services might take the form of amplification devices; in a few cases such services might take the form of real-time captioning or interpreters. The form of the required service should play no part in the determination of whether the state may provide that service in a parochial school that may offer the only appropriately structured educational setting available for a particular deaf child. If the majority's opinion below is affirmed, the result will be to deny some deaf children an education best calculated to serve their unique and pressing needs.

III. The Primary Effect of Providing Interpreters is Not to Advance Religion but to Facilitate the Education of Deaf Children

A statute challenged under the Establishment Clause will be upheld if (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) the statute does not foster an excessive government entanglement with religion. *Mueller v. Allen*, 463 U.S. 388, 394 (1983); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). The court below unanimously ruled that the IDEA had a valid secular purpose (963 F.2d 1191, 1193-94; *id.* at 1197-98 (Tang, J., dissenting)), but a majority of the

¹² It is important to note that AGBAD is not criticizing the public school system, or suggesting that private schools are superior to public schools. AGBAD is merely explaining that, in some cases, private school placement may be the appropriate placement for deaf children.

court found that the primary effect of the IDEA's provision of interpreters to children attending parochial schools was to aid religion.¹³ The majority believed that the presence of an interpreter employed by the state in a parochial school creates the "symbolic union" between church and state found impermissible by this Court in *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985).

For the reasons stated by Judge Tang, we submit that the majority erred in holding that supplying deaf children who attend parochial schools with interpreters runs afoul of the "effects" prong of the *Lemon* test. As Judge Tang points out, the majority erroneously focused on the specific use to which the aid would be put to in this case rather than on whether the program as a whole would have the primary effect of advancing religion. See 963 F.2d at 1198, citing *Witters v. Washington Services for the Blind*, 474 U.S. 481, 487-88 (1986). Moreover, as Judge Tang states, the fear that neutrally providing interpreters to all deaf children, including those who attend parochial schools, would create a "symbolic union" between church and state is chimerical. See 963 F.2d at 1201.

The majority below has also misread this Court's opinion in *Grand Rapids*. The aid at issue in *Grand Rapids* — public school teachers offering supplementary classes at the parochial schools, and salary supplements for parochial school teachers for teaching additional classes after hours in parochial school buildings — was made to the parochial schools or parochial school teachers and benefited the parochial schools by relieving those religious

¹³ The majority did not reach the question of excessive entanglement, but, as Judge Tang demonstrated in his opinion below, "the church/state contacts involved in supervising a sign language interpreter's job performance are sufficiently contained and abbreviated to prevent excessive entanglement." 963 F.2d at 1204 (Tang, J. dissenting).

institutions of costs they would have otherwise incurred. 421 U.S. 365-66. In contrast, the provision of the interpreter is made directly to a deaf child, and does "not relieve the [parochial school] of any preexisting financial or educational obligation." 963 F.2d at 1200 (Tang, J., dissenting). Moreover, unlike the aid in *Grand Rapids*, which was targeted solely to private schools, almost all of which were sectarian (473 U.S. at 349), under the IDEA deaf children are supplied with interpreters regardless of the type of school they attend.

Thus, far from the massive infusion of aid to the parochial schools at issue in *Grand Rapids*, the provision of an interpreter to a student in any school (including a parochial school) at issue here is much more akin to the aid upheld in *Witters* — state vocational aid which a blind student applied to pursue religious studies at a Christian college. Indeed, the aid at issue in this case is even more circumscribed than the aid in *Witters*, being a single type of in-kind aid rather than a general grant-in aid. The aid at issue here, then, is even better analogized to the loan of a state owned wheel chair or hearing aid to disabled children for use at school, including parochial schools, aid which it would be fanciful to construe as creating a "symbolic union" between church and state.

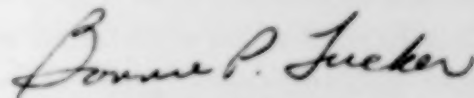
Finally, the perspective provided by Part II of this brief reveals an additional secular effect that the court below did not consider. As discussed above, many deaf children choose to attend parochial school for reasons unrelated to religious preference, for the purely secular purpose of attending an affordable school with classes small enough and structured enough to accommodate their special needs. When the totality of circumstances is considered — the circumscribed nature of the aid made available to deaf children regardless of the type of school they attend; aid that is given directly to the children, not

to the parochial schools; aid which in many cases will facilitate a purely secular rehabilitative purpose of deaf children in choosing to attend parochial schools — it is evident that the primary effect of the aid at issue in this case is a secular one, with any benefit to religion being at most "indirect, remote, or incidental." See *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973).

Conclusion

For the foregoing reasons, *amicus curiae*, The Alexander Graham Bell Association for the Deaf, urges this Court to reverse the decision below and thereby enable deaf children to receive the services necessary to achieve the appropriate education to which they are legally and morally entitled.

Respectfully Submitted,



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